

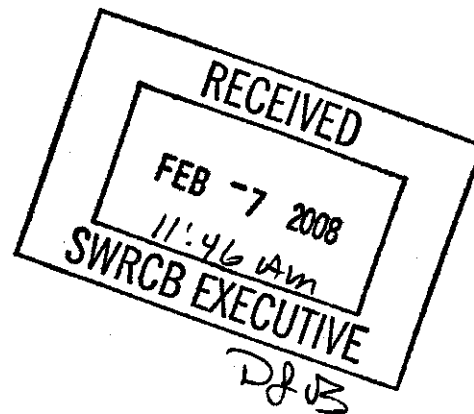
SOMACH, SIMMONS & DURN

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

813 SIXTH STREET
THIRD FLOOR
SACRAMENTO, CA 95814-2403
(916) 446-7979
FACSIMILE (916) 446-8199
WEBSITE: www.lawssd.com

2/19/08 BdWrkshp Item 10
Water Quality Enf. Policy
Deadline: 2/7/08 by 12 p.m.

February 7, 2008



Tam Doduc, Chair and Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Attn: Jeanine Townsend, Clerk to the Board, commentletters@waterboards.ca.gov

Re: Water Quality Enforcement Policy Draft January 8, 2008

Dear Chair Doduc and Members:

Our firm represents the California Farm Bureau Federation ("Farm Bureau") on water quality regulatory matters. On behalf of our client, we appreciate the opportunity to provide comments on the proposed revisions to the Water Quality Enforcement Policy ("Enforcement Policy" or "Policy"). Farm Bureau is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing roughly 91,000 members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau has reviewed the language of the Policy as well as its intent. Overall, Farm Bureau understands and appreciates the State Water Resources Control Board's ("State Water Board") goal "to create a framework for identifying and investigating instances of noncompliance, for taking enforcement actions that are appropriate in relation to the nature and severity of the violation, and for prioritizing enforcement resources to achieve maximum environmental benefits." (Policy at p. 1.) Farm Bureau supports the State Water Board's efforts to prepare an Enforcement Policy that can be applied fairly and consistently.

However, the State Water Board must recognize that in practical reality it may not be possible to adopt a "one size fits all" type of Enforcement Policy. The State's water quality regulatory authority, as administered by the State Water Board and the Regional Water Quality Control Boards ("Regional Water Boards"), is broad. To administer this broad

policy, the Water Boards utilize different types of orders that apply to different types of dischargers, including those regulated by Conditional Waivers from Waste Discharge Requirements. The Enforcement Policy provides little distinction between the types of orders and the individuals regulated by the orders. Because of the lack of distinction, some of the enforcement procedures and provisions may not translate or apply appropriately to individuals or entities that have not traditionally been regulated by Regional Water Boards (i.e., farmers and agricultural landowners). Thus, Farm Bureau is concerned that the Enforcement Policy may result in unintended consequences on farmers and agricultural landowners that try to comply with new and constantly changing regulatory requirements. Our comments on the most significant issues are provided below.

Technical Reports and Investigations Pursuant to Section 13267 Must Bear a Reasonable Relationship to the Request

The Enforcement Policy outlines the various enforcement actions available to the State Water Board and the Regional Water Boards. Embedded within the outline is direction to the Regional Water Boards to ensure compliance with the relevant provisions identified. Farm Bureau is concerned that the direction provided to the Regional Water Boards for technical reports and investigations lacks the essential requirement for compliance.

The Enforcement Policy directs the Regional Water Boards to include a brief statement regarding the information being sought and the water quality issue being investigated when requiring technical reports pursuant to Water Code section 13267. However, the Enforcement Policy fails to remind the Regional Water Boards that the burden of preparing the reports, including costs, "shall bear a reasonable relationship to the need for the report and the benefits to be obtained." (Wat. Code § 13267.) The Enforcement Policy does not direct the Regional Water Boards to use this authority with caution and pursuant to statutory requirements.

The lack of direction is troublesome considering the potential enforcement activities that may result from an individual's failure to comply with a request sought pursuant to this authority. In particular, the Policy categorizes violations of section 13267 as class II violations, where there is no unauthorized discharge. Considering the potential ramifications for violation, the Enforcement Policy should clearly outline the Regional Water Boards' legal responsibilities when exercising regulatory authority. Farm Bureau recommends that the language be amended accordingly.

The Enforcement Policy Inappropriately Extends Economic Benefit Recovery to non-NPDES Violations

The Policy incorrectly implies that both sections 13351 and 13385(e) of the Porter-Cologne Act require civil liabilities to be set at a level that accounts for any economic benefit or savings gained through violations. (Policy at p. 31.) In 2000, the California Legislature

amended Water Code section 13385(e), which applies to surface water discharges subject to NPDES permit requirements, to specify that "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." In fact, legislation proposed during the 2005-2006 session would have amended section 13351 to require recovery of economic benefit for enforcement actions brought pursuant to Water Code section 13350. This amendment was rejected. The State Water Board may not override statute by policy.

Economic benefit must already be considered as a factor in determining the amount of civil liability. Recovery of economic benefit as a floor has understandable appeal, but in reality it is difficult to calculate economic benefit with specificity. This is especially true in agriculture where cultural practices vary from crop-to-crop, region-to-region, and farmer-to-farmer. Also, the other factors set forth in the Water Code, such as conduct of the discharger, environmental harm, and history of violations become overshadowed and economic benefit becomes the primary focus. While economic benefit is clearly relevant to assessing a penalty amount, we believe it is appropriately one of multiple factors to be considered in imposing liability.

Economic Benefit Factor Should Include Consideration of Ability to Implement BMPs

When economic benefit is being considered to set the amount of civil liability, an individual or entity's ability to pay for improvements should be considered. As currently proposed, the Enforcement Policy implies that all dischargers make improvement determinations based on "an acceptable risk of doing business." The Policy fails to recognize the unique circumstances faced by most farmers and agricultural landowners. Unlike other entities that can increase prices or rates to pay for technical reports or install best management practice type improvements, farmers are "price-takers." As "price-takers," most farmers are forced to accept commodity prices that are established on the world market. Few farmers have the luxury of setting prices at an individual level necessary to cover all business expenses. Thus, in allocating financial resources on a daily and annual basis, farmers must compare the cost of compliance to meeting basic family needs. Because of the unique circumstances faced by most farmers, the Enforcement Policy should be revised to allow consideration of special circumstances and should not assume that all cost delay and avoidance is part of a "risk of doing business" decision.

Ability to Pay Information Should be Treated as Private Information

The Enforcement Policy states, "any financial evidence that the discharger chooses to submit in an enforcement proceeding will generally be treated as public information." (Policy at p. 39.) Like the economic benefit section discussed above, this language fails to recognize unique circumstances associated with farmers and agricultural landowners that may be subject to Regional Water Board regulatory orders. For many farmers and agricultural landowners, financial evidence associated with an individual or entity's ability to pay is directly

Tam Doduc, Chair and Members
Re: Water Quality Enforcement Policy
February 7, 2008
Page 4

intertwined with personal financial information for the farmer and/or agricultural landowner. By treating personal financial information as public, the State is potentially exposing farmers and agricultural landowners to fraud and abuse by others. To avoid such unintended consequences, the Enforcement Policy should be revised to allow individuals and agricultural entities the ability to submit financial evidence with the understanding that such information will be kept private and not be subject to public review.

Farm Bureau appreciates the opportunity to provide comments regarding the proposed revisions to the Policy.

Sincerely,

A handwritten signature in cursive script, appearing to read "Theresa A. Dunham". The signature is written in dark ink and is positioned above the printed name.

Theresa A. Dunham

cc: Chris Scheuring
TAD:cr